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No. 73-610

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In the Supreme Court of the United States

OCTOBER TERM, 1973

JAMES W. CADE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1973 (Pet. App. B), and a petition for rehearing was denied on September 7, 1973 (Pet. App. C). The petition for a writ of certiorari was filed on October 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the jury's finding that petitioner knew that the automobiles involved in his Dyer Act prosecution were stolen.

2. Whether it was reversible error in the circumstances of this case for the trial court to exclude as

hearsay proffered testimony by petitioner, designed to show his allegedly innocent state of mind, concerning the details of a conversation between petitioner and a state automobile registration official relative to the records pertaining to the title to a particular automobile.

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted on five counts—Four, Six, Eight, Twelve, and Fourteen—of an 18-count indictment, each even-numbered count of which charged him and his uncle, Jimmie Carl Cade, with having received and sold a stolen motor vehicle moving in commerce, knowing it to have been stolen, in violation of 18 U.S.C. 2313 (Tr. 12-16, 674; Pet. 3, 10).[1] On January 2, 1973, petitioner was sentenced to four years' imprisonment on each count, the terms to run concurrently (Pet. 10). The court of appeals affirmed (Pet. App. A).

Petitioner and Jimmie Carl Cade ("Jimmie") owned and operated a used car establishment in Charleston, South Carolina, doing business under the name Cade Auto Sales (Tr. 471-475, 551-552; Pet. 3). Sherwood Watts and Leonard Long, co-defendants who pleaded

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[1] "Tr." refers to the trial transcript, in two consecutively paginated volumes, a copy of which is being lodged herewith.

Neither petitioner nor Jimmie Cade was involved in the odd-numbered counts, as to which see note 2, *infra*. Of the remaining even-numbered counts, two were dismissed on motion of the government, and petitioner was acquitted on two (Tr. 445, 674). Jimmie Cade was convicted on four counts and acquitted on three (*ibid.*). His conviction was affirmed contemporaneously with petitioner's. He does not seek review here.

guilty and testified for the government,[2] were business acquaintances of the Cades (Tr. 85, 153, 156-157). In late 1970, Watts became employed by Frank Poellnitz, the proprietor of a Detroit, Michigan, automobile repair shop (Tr. 86-87, 105, 108, 161-162). During a visit by Watts to Charleston, Long asked Watts if it was possible to buy used cars "cheap" in Detroit; Watts said it was (Tr. 87-88, 109-113, 163). In February or March 1971, Long went to Detroit in search of such cars and communicated with Watts (Tr. 88-89, 164-165, 209-210). During the following month or two, Long and Watts each bought from Poellnitz a number of automobiles which, individually or jointly, they then transported to Charleston and sold to Cade Auto Sales (Tr. 90-104, 210-225). It is undisputed that all of the vehicles were stolen. The only disputed issue at the trial was whether the Cades knew they were stolen.

The first of the automobiles involved in the transactions, a green 1971 Cadillac, was bought by its true owner, new, in January 1971 for $7,533 (Tr. 34-39). Following its theft, in early March of 1971, Long bought it from Poellnitz for $3,600 (Tr. 34, 170, 211, 249). Long did not know at the time that the car was stolen (Tr. 229). The car appeared to have been damaged and a section of one side was in the process of being repainted (Tr. 116-117, 166-168, 173, 229, 233). Long and Watts drove the vehicle together to Charleston, where Long offered it to the Cades for $5,000 (Tr. 94,

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[2] Watts and Long were charged in the odd-numbered counts of the indictment, individually or jointly, with having transported in commerce (in violation of 18 U.S.C. 2312) the stolen vehicles which the Cades, in the even-numbered counts, were alleged to have received and sold. Each pleaded guilty before trial to one count (Pet. 3; Tr. 103, 241).

103-104, 211-212). Either petitioner or Jimmie or both asked Long if the car was "hot." Long said "not that [he knew] of" (Tr. 212). Following some dickering as to the price, the Cades bought it for $5,000 (Tr. 211-212). (This first of the transactions involved in the charges was the subject of Count Two, as to which judgments of acquittal were granted as to both defendants for lack of sufficient proof that they had known the car was stolen (Tr. 13, 430-445).)

The evidence relating to the five vehicles involved in the counts on which petitioner was convicted showed that they were one Cadillac, three Lincoln Continentals, and one Ford Thunderbird. All were undamaged and nearly new when—within days prior to the Cades' purchases of them—they were stolen. The Cadillac and Continentals were purchased by their true owners for prices ranging from $7,800 to $8,226, and purchased by the Cades for between $4,500 and $5,000 (Tr. 13-15, 39-57, 101-102, 213-214, 217-221, 347-352, 359-365, 380-395). The Ford Thunderbird was purchased by its owner for $5,500 and purchased by the Cades for $3,000 (Tr. 220-221, 359-365). In two instances, purchasers or prospective purchasers called the Cades' attention to suspicious circumstances—once when it was discovered that a lock had been glued into its compartment in the Cadillac (Tr. 334-335), and once when a box containing two keys, neither of which would fit the ignition or door lock, was discovered in one of the Continentals attached to a wall behind the engine (Tr. 401-404, 411-413, 417-419).

Whereas the first vehicle involved in these transactions was registered in Michigan in Long's name, prior to its transportation to Charleston, the bills of sale and certificates of title relating to the second and subsequent vehicles were, at the Cades' request, made out

(also in Michigan) in the name of either petitioner or Jimmie (Tr. 198-199, 212, 214, 252-254, 267-268). This was to dispense with having to "change the papers" when the cars were delivered in Charleston to the Cades (Tr. 254). Further to expedite the deliveries, Jimmie, following the second purchase, obtained two sets of dealer plates, registered in the name of Cade Auto Sales, and asked Long to put them on (in Detroit) the next cars he bought (Tr. 216-217, 253). The Cades told Long and Watts during their dealings that they wanted all the cars they could get (Tr. 92-93, 99, 213, 251); that they were interested in Lincolns and Cadillacs particularly (Tr. 90, 99, 184); and that they did not care whether the cars were stolen so long as they were delivered with the papers needed to permit their resale (Tr. 93, 100, 130-131, 203, 206, 212, 222-223, 259).

Joann Long, Leonard Long's wife, testified that on two occasions in the course of their dealings petitioner and Jimmie had conferred with Watts and her husband for approximately an hour in the yard of the Longs' Charleston residence; on one of these occasions, while Mrs. Long was in the house, the four men had gone into the back bedroom of the residence and closed the door (Tr. 271-273). Testifying in his own behalf, petitioner acknowledged having met with Jimmie and Long in the yard of the residence, but denied he had ever been in the house (Tr. 572-573, 603).

Poellnitz told Watts, prior to Watts' transportation of the last car to Charleston, that it was stolen (Tr. 200, 204-205). Watts did not tell the Cades this because they had told him they did not care whether the cars were stolen (Tr. 205-206). Moreover, Watts testified that the Cades had previously told him that they knew the cars were "hot"—that there "had to be

something wrong with them for that price" (Tr. 125, 131, 200, 205, 258).

ARGUMENT

1. After noting that the government had presented evidence that petitioner had informed his suppliers that he did not care if the vehicles were stolen so long as they were delivered with the papers needed to permit their resale, the court of appeals remarked (Pet. App. A, p. 27):

> To hold that a person lacked a requisite knowledge to sustain a criminal conviction because he deliberately sought to insulate himself from acquiring this knowledge would be a gross distortion of the criminal law.

In reliance on this comment and on the fact that the district court, in denying motions for judgments of acquittal as to all except one of the counts, had remarked that the same evidence was "probably enough," "without the other circumstances," to require submission of the case to the jury (Tr. 441), petitioner contends that this case presents the question whether proof that the accused in a Dyer Act prosecution did not care if the automobiles were stolen is sufficient to satisfy the statutory requirement of proof that he knew they were stolen (an issue, he says, requiring resolution by this Court) (Pet. 2, 11-15). That question, however, is not involved. We agree that the government must show that the defendant in such a prosecution actually knew the vehicles involved were stolen. See, *e.g.*, *United States* v. *Dunn*, 418 F. 2d 245 (C.A. 4), certiorari denied, 397 U.S. 961; *United States* v. *McCurry*, 248 F. 2d 116 (C.A. 3). But the government did so prove here, through clearly suffi-

cient evidence, and the jury so found. The jury was specifically instructed that to convict it had to find that petitioner knew the automobiles were stolen (Tr. 668; cf. Tr. 660-662). The verdicts of guilty thus contained implied findings, as the court of appeals noted, that petitioner had the required guilty knowlege (Pet. App. A, p. 26). The question on appeal, as the court below further observed, was whether there was "substantial evidence to support" the implied findings (*ibid.*). The question before the court of appeals, in other words, was simply whether the proof sufficed to sustain the conviction. No different question is posed here.

The above-quoted comment of the court of appeals, on which petitioner bases his contention that the issue posed is whether "doesn't care" can mean "knows" in a Dyer Act prosecution, was made in the context of a discussion of the inference of guilty knowledge which the jury is permitted to draw from possession of recently stolen property, and of whether the inference had been rebutted in this case (Pet. App. A, pp. 26-27). We do not believe that the court intended to imply by the comment that proof that the accused did not care whether a vehicle was stolen is generally sufficient, without more, to meet the statutory requirement of proof of knowledge that the vehicle was stolen. Certainly the court nowhere expressly articulated such a notion. We submit, in any event, that the comment was at most *dictum*—the "specific question" before the court, as it had earlier remarked, was "whether there was substantial evidence to support the implied findings in the jury's verdict that [petitioner] had knowledge the vehicles were stolen" (Pet. App. A, p. 26).

The district court's comment upon which petitioner bases his argument—that the testimony of the suppliers

about petitioner's "not caring" was "probably" enough, "without the other circumstances," to require denial of the motions for acquittal—is similarly inapposite. Since the government's evidence in fact contained a great many "other circumstances," the question whether the testimony referred to would have sufficed in itself to warrant submitting the case to the jury was not before the court. It is at all events clear from the jury instructions to which we have referred that the trial court actually imposed upon the government the burden of proving actual guilty knowledge.

Neither of the courts' statements, in short, presents any basis for further review by this Court of what in substance is merely a question of the sufficiency of the evidence.

The evidence, contrary to petitioner's related contention (Pet. 15-20), was sufficient. There was substantial evidence that petitioner and Jimmie, his partner-codefendant, acquired the vehicles at substantially less than their true value—always a relevant consideration in Dyer Act prosecutions.[3] They told Long and Watts, their suppliers, that they wanted all the cars they could get, and, in furtherance of that objective, they arranged to have the vehicles titled in their names, sight unseen, in the distant jurisdiction of their origin. They further told these confederates, as noted above, that they did not care if the cars were stolen so long as the papers needed to permit their resale accompanied them; though such an attitude of unconcern as to whether the vehicles they were dealing in were stolen may have been insufficient in itself to show guilty knowledge, it was plainly a signi-

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[3] Cf. *Powell* v. *United States*, 410 F. 2d 710, 714 (C.A. 5); *United States* v. *McCurry*, *supra*, 248 F. 2d at 117; *Schwachter* v. *United States*, 237 F. 2d 640, 643 (C.A. 6).

ficant part, as the courts below recognized, of the overall circumstantial showing. They told Watts, finally, that they knew the cars were "hot"—that there "had to be something wrong with them for that price." This and the other evidence to which we have referred, particularly when fortified by the inference of guilty knowledge which the jury had the right to draw from their acknowledged possession of the recently stolen vehicles without satisfactory explanation (cf. *Barnes* v. *United States,* 412 U.S. 837), was more than ample to sustain the conviction.

2. Testifying in his own behalf, petitioner stated that at the time of the Cades' purchase of the first vehicle from Long (the subject of the count as to which judgments of acquittal were granted) he called the Michigan Motor Vehicle Registration and Title Department to inquire whether Long had a good title and that, as a result of a conversation he had with an official in the Department, there was no doubt in his mind that Long did (Tr. 555-556). During a subsequent recess, petitioner's counsel asked leave to elicit, through petitioner, what was said in the conversation, in order to show petitioner's state of mind at the time (Tr. 578). The trial court noted that the official involved was available to testify and, ruling that the proposed testimony would constitute inadmissible hearsay, denied the motion (Tr. 579-580). In a subsequent affidavit, petitioner's counsel stated that petitioner would have testified, if permitted, that the official told him that the car was registered to the man who was offering it for sale to petitioner, that there were no liens against it, and that he would mail the title the following day (Pet. App. A, pp. 27-28).

Petitioner's contention that it was reversible error for the court to deny him leave to testify to the

details of his conversation with the official (Pet. 2, 20-23) is answered by the opinion of the court below (Pet. App. A, pp. 27-28), on which, as to this point, we principally rely. We stress that petitioner was acquitted by the court on the count dealing with the automobile discussed in the conversation and that the conversation was at most tangentially relevant to the question whether petitioner knew the other vehicles were stolen. It should be pointed out, in addition, that Long, the prosecution witness who sold the automobile in question to the Cades and whose title to the vehicle was the subject of the conversation, confirmed the occurrence of the conversation and testified to enough of the details of it that if the jury credited the testimony—and it had no reason not to—it must have been satisfied that at least as to this vehicle petitioner had made an effort to check on Long's title. Long testified that petitioner asked the official whether a title had been issued for the vehicle, supplied him its serial number, and was informed, "yes, sir, I have the title here in my hand" (Tr. 236, 251-252). In light of this testimony of Long, and of the various considerations mentioned by the court of appeals, the court correctly concluded that even if the exclusion of the proffered testimony of petitioner was erroneous, petitioner suffered no prejudice thereby.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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